Supreme Court, U.S.
FILED
SEP 17 1997
CLERK

(2)

No. 97-300

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., *Petitioner*,

v.

RAMON MARTINEZ-VILLAREAL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

Whether Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (the Act) violates the Suspension of the Writ Clause insofar as it effectively bars the exercise of federal habeas corpus jurisdiction over competency to be executed claims.

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INTEREST OF AMICUS CURIAE

Amicus, the State of California, is responsible for defending presumptively valid state judgments, including 481 death penalty judgments, against federal habeas corpus challenges. It is reasonable to expect the issue of present competency to be executed to arise repeatedly. Here, the question is squarely presented as to whether Congress could exercise its plenary power to limit or withdraw the habeas corpus jurisdiction of the federal courts over competency to be executed claims without running afoul of the Suspension of the Writ Clause. Amicus respectfully urges issuance of the writ to answer this question.[1]

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1. This brief is submitted in support of the petition for certiorari by amicus through its Attorney General in accordance with Rules 37.2 and 37.5 of the Rules of the United States.

ARGUMENT

The Writ Should Issue So That This Court Can Resolve The Question Of Whether Congress Enjoyed The Power Under Article III To Withdraw Federal Habeas Corpus Jurisdiction Over Competency To Be Executed Claims Without Infringing On The Suspension Of The Writ Clause

As members of this Court remarked just last term,

> "The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . . ." Given the fact that the Members of Congress are elected by the People of the several States, with each State receiving an equal number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents.

Printz v. United States, ___ U.S. ___, 117 S.Ct. 2365, 2394 (1997) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, J.J.) (*quoting Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550-551 (1985), internal citations omitted).

When Congress passed, and the President signed, the Act, the Federal Government chose to enhance the integrity, vitality, and finality of state laws and judgments in sections 103, 104, and 106 of the Act by limiting the habeas corpus jurisdiction of the federal courts. And, as members of this Court indicated as recently as last term, habeas corpus jurisdiction can rise or fall via congressional enactment. *See Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 2071 (1997) (Rehnquist C.J., joined by Scalia,

Kennedy, and Thomas, J.J.). However, this begs the question of how much Congress can restrict the habeas corpus jurisdiction of the federal courts without running afoul of the Suspension of the Writ Clause.[2]

In *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333 (1996) this Court observed that, in ascertaining whether the Act's new restrictions on second or successive petitions violated the Suspension Clause, it would "assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.*, at 2340. However, even after having made this assumption, this Court nonetheless reaffirmed that judgments about the proper scope of the writ are "'normally for Congress to make.'" *Id.* (*quoting Lonchar v. Thomas*, 517 U.S. ___, 116 S.Ct. 1293, 1298 (1996)).[3]

Established notions of the separation of powers and federalism at the heart of Congress's Article III power to grant or withdraw federal jurisdiction would militate in favor of an extremely broad and expansive interpretation of that power vis-a-vis the Suspension Clause. And, as both the Fifth and Eleventh Circuits have effectively recognized, such a broad and expansive interpretation would be especially appropriate where the States have afforded process for the adjudication of a claim such as competency to be executed which this Court may in turn

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2. The Suspension of the Writ Clause is located in Article I, section 9, clause 2 of the Constitution. That clause provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

3. In *Felker*, this Court concluded the newly-imposed restrictions in the Act as to second or successive petitions generally passed constitutional muster under the Suspension Clause because these restrictions fell within the "compass of the evolutionary process" for handling such petitions. *Felker*, 116 S.Ct. at 2340.

review via its certiorari power. *See In re Davis*, ___ F.3d ___, 1997 WL 534153, *5 (5th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1556 (11th Cir. 1997).

Article III of the Constitution states in relevant part that the "appellate jurisdiction" of this Court, and of those "inferior Courts" established by Congress, is subject to definition by Congress, which is empowered to make "such Exceptions and . . . such Regulations," as Congress deems fit. Art. III, § 2, cl. 2. Construing Article III, this Court has found that "[t]he Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (internal citations omitted). From this construction of Article III has evolved what the Ninth Circuit labels "[t]he black letter law on federal subject matter jurisdiction." *In re Hunter*, 66 F.3d 1002, 1005 (9th Cir. 1995).

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and that the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (per curiam) (internal citations omitted).

In part, this construction of Article III reflects quintessentially important separation of powers concerns regarding the demarcation of the legislative and judicial spheres of authority. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807-810 (1985) (Article III grant of power to the federal courts to hear "federal questions" is not "self-executing" such that the federal

courts's jurisdiction to hear such cases in fact derived from a "more limited" congressional statute).

However, this construction of Article III also reflects equally venerable and fundamental concerns regarding the sovereign rights of the States to carry out their local affairs by enacting and implementing their own laws and rules. As this Court has observed, the striking of the federal-state balance is our Framers's "unique contribution" to political science and theory because of their insight that "freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 549, 575-576 (1995) (Kennedy, J., concurring, joined by O'Connor, J., concurring); *see also id.*, at 552 (majority opinion). It has therefore become well-embedded in the political and legal fabric of our Nation that "'[t]he powers delegated by the . . . Constitution to the federal government are few and defined. Those which . . . remain in the State governments are numerous and indefinite.'" *Id.*, at 552 (*quoting* The Federalist, No. 45, pp. 292-293 (C. Rossiter ed. 1961)).[4]

This Court repeatedly has been called upon to adjudicate this federal-state jurisdictional line. *See, e.g., Printz*, 117 S.Ct. at 2376-2378; *City of Boerne v. Flores*, ___ U.S. ___, 117 S.Ct. 2157, 2162-2166, 2170-2172 (1997); *Idaho v. Coeur d'Alene*, ___ U.S. ___, 117 S.Ct. 2028, 2033-2034, 2040-2043 (1997); *see also id.*, at 2035-2040 (lead opinion of Kennedy, J., joined by Rehnquist, C.J.); *Arkansas v. Farm Credit Services of Cent. Ark.*, ___ U.S. ___, 117 S.Ct. 1776, 1780-1782 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S.Ct. 1114, 1127-1132 (1996).

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4. Indeed, this Court has shown a great solicitude for the state judiciary. "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. 227, 241 (1989).

Here, the question presented to this Court for issuance of the writ takes on a special hue in that Congress has chosen in the Act to use its plenary Article III power to vindicate state sovereignty interests vis-a-vis the federal courts. *Cf. Farm Credit Services*, 117 S.Ct. at 1780 (showing special sensitivity to Congress's jurisdictional line-drawing against federal court intervention in state taxation questions). The Suspension Clause has never been viewed in historical or modern times as any substantial impediment to Congress's plenary exercise of its Article III power to restrict federal habeas corpus jurisdiction.

Recognizing the extremely limited role of the habeas corpus writ as it was understood by the Framers in 1789 when they drafted our Constitution, no less an authority than Chief Justice Marshall explained, "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Ex Parte Bollman*, 8 U.S. (4 Cranch) 74, 93-94 (1807).[5]

Even after the Civil War, in *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), this Court held that Congress could by statute withdraw this Court's appellate jurisdiction over habeas petitions filed under the Habeas Corpus Act. "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words." 74 U.S. (7 Wall.) at 514. And, more recently, Justice Brennan urged in *Wainwright v. Sykes*, 433 U.S. 72 (1977) that "Congress, as the primary

5. A comprehensive discussion of the extremely limited role of the writ as the Framers understood it in 1789, and, consequently, as it exists today, is contained in the petition for certiorari itself. *See* Pet. for Cert., at 13-19.

expositor of federal court jurisdiction, remains free to undo the potential restrictiveness of today's decision [applying a cause and prejudice standard to excuse state procedural default] by expressly defining the standard of intervention under 28 U.S.C. §2254." *Id.*, at 101 n.2 (Brennan, J., dissenting, joined by Marshall, J.); *see also Lindh*, 117 S.Ct. at 2071 (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, J.J.) (viewing the Act's new deferential standard of review of state court judgments as a jurisdictional limitation).

Not only does the Ninth Circuit opinion below fail to take account of the extremely limited scope of the Suspension Clause as it was understood by the Framers who drafted it in 1789, but it represents a significant departure from the fundamentals of federal subject matter jurisdiction. Especially in the context of habeas corpus law, these fundamentals have been applied without much dissension for over two hundred years. Until now.[6]

6. It may be helpful in the end to view federal habeas corpus in an alternative light as a partial repeal of the full faith and credit normally accredited to state court judgments. *See* Brief Amicus Curiae of the Criminal Justice Legal Foundation In Support of Respondent In *Lindh* v. *Murphy* (No. 96-6298), 1997 WL 126132, *7; *Matsushita Elec. Indus. v. Epstein*, 516 U.S. ___, 116 S.Ct. 873, 876 (1996). If federal habeas corpus is viewed in that light, then the Act amounts to nothing more than a partial regrant of full faith and credit to state court judgments. State court judgments can always be reviewed by this Court via its certiorari power such that according them full faith and credit is appropriate.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court grant the petition for certiorari.

Dated: September 16, 1997.

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